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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

ORISON F. McDONALD, II
AND
HERBERT DARRELL BOMAR,
Petitioners,

VS.

BILL BURROWS, SHERIFF OF WICHITA
COUNTY, TEXAS; THE STATE OF TEXAS; AND
THE STATE OF MINNESOTA,
Respondents

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May an asylum state court deny extradition due to the bad faith motive of the demanding state's prosecutor in seeking extradition to assist collection of private debts in contravention of the alleged fugitive's constitutionally protected right of effective access to judicial process?
2. May an asylum state court deny extradition due to the failure of the asylum state to accord due process to the alleged fugitive?

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	2-5
Opinions of Lower Courts	6
Statement of Jurisdiction	7
Application for Stay.....	8
Constitution and Statutory Provisions.....	9-14
Statement of Case	15-18
Presentment of Federal Questions in Lower Court	19-22
Reasons for Granting Writ of Certiorari	
1. The decision below denies Petitioners the right to protect their constitutional right of access to the courts by permitting extradition to be used for private purposes	23-40
2. The decision below denies Petitioners the right to assert their right to due process at a meaningful time	40-47
Conclusion	47
Appendix.....	Separate Document

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

Article IV, Section 2, Clause 1	9,37
Article IV, Section 2, Clause 2	9,24
First Amendment	9,22
Sixth Amendment	10,40
Fourteenth Amendment, Section 1	10,22-23,39-41

FEDERAL STATUTES

18 U.S.C., Sec. 3182.....	11-12,35
---------------------------	----------

STATE STATUTES

Minn. Stat. Ann., Vol. 41, Sec. 629.23(1).....	12,30
Tex. Code Crim. Proc. Ann., Art. 51.13, Sec. 23(1).....	13,30

UNITED STATES SUPREME COURT CASES

Armstrong v. Manzo, 380 U.S. 545, 552 (1965)	41
Bounds v. Smith, 430 U.S. 817, 52 L.Ed 2d 72 (1977)	24
Braden v. 30th Judicial Court of Kentucky, 410 U.S. 484, 498-499, 35 L.Ed. 2d 433, 454 (1973)	46
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L.Ed 2d 642 (1972)	23

Chambers v. Baltimore & Ohio Railroad , 207 U.S. 142, 52 L.Ed 143 (1907)	23
Dombrowski v. Pfister , 380 U.S. 479, 14 L.Ed. 2d 22 (1965)	37
Forsyth v. Hammond , 166 U.S. 506, 513 (1897)	41
Gerstein v. Pugh , 420 U.S. 114 (1975)	34-35
Innes v. Tobins , 240 U.S. 127, 134-135 (1916)	36
Parrat v. Taylor , 451 U.S. 527, 540 (1981)	41
McDonald v. Texas , 103 S.Ct. 1193, 75 L.Ed. 2d 438 (1983)	17
Michigan v. Doran , 439 U.S. 282, 283, 288, 289 (1978)	33-35, 44-45
Morrisey v. Brewer , 408 U.S. 471 (1972)	42
United Mine Workers of America v. Illinois State Bar Association , 389 U.S. 217, 19 L.Ed. 2d 426 (1967)	30
Wolff v. McDonnell , 418 U.S. 539, 41 L.Ed 2d 935 (1974)	24
Younger v. Harris , 401 U.S. 37 (1971)	19, 36

FEDERAL COURT OF APPEALS CASES

Barnette v. Evans , 673 F.2d 1250 (11th Cir. 1982)	38
--	----

Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973)	42-44
Shaw v. Garrison, 467 F.2d 113, 120 (5th Cir. 1972) (cert den'd 409 U.S. 1024, 34 L.Ed. 2d 317)	38
Wilson v. Thompson, 593 F.2d 1375, 1382 (5th Cir. 1979)	38

STATE CASES

Bishop v. State, 92 So.2d 323 (Ala. Ct. App. 1957)	31
Commonwealth ex rel Spivak v. Heniz, Sheriff, 14 A.2d 875 (Penn. 1940) ...	31
Ex Parte Bradley, 456 S.W. 2d 370 (Tex. Crim. App. 1970)	32
Ex Parte Johnson, 25 P.2d 1111 (Okla. Crim. App. 1933)	31
Ex Parte Maddox, 27 P.2d 171 (Okla. Crim. App. 1933)	31
Ex Parte Kuhns, 137 P.2d 84 (Nev. 1913)	31
Ex Parte McDonald, 631 S.W.2d 222, (Tex. Ct. App. 1982)	16
Ex Parte Offutt, 234 P. 222 (Okla. Crim. App. 1925)	31
Ex Parte Owens, 245 P.2d 68 (Okla. Crim. App. 1926)	31
Harris v. State, 82 So.2d 439 (Ala. Ct. App. 1955)	31

Hobbs v. State of Tennessee, ex rel (Ala. Ct. App. 1942)	31
Klaiber v. Frank, 86 A.2d 679 (N.J. 1952)	31
Scott v. State, 33 So.2d 390 (Ala. Ct. App. 1948)	31
State ex rel Fowler v. Langum, Sheriff, 147 N.W. 708 (Minn. 1914)	31, 32
State ex rel Hourigan v. Robinson, Sheriff, 257 S.W.2d 9 (Tenn. 1953)	31
State ex rel Nemec v. Sheriff of Hennepin County, 181 N.W. 640 (Minn. 1921) ...	31, 32
State ex rel Nisbett v. Tool, 72 N.W. 53 (Minn. 1897) 72 N.W. 53 (Min. 1897)	31, 32
Stubblefield v. State, 47 So.2d 662 (Ala. Ct. App. 1950)	31
Work v. Corrigan, 34 Ohio St. 64, 32 Am. Rep. 345	31

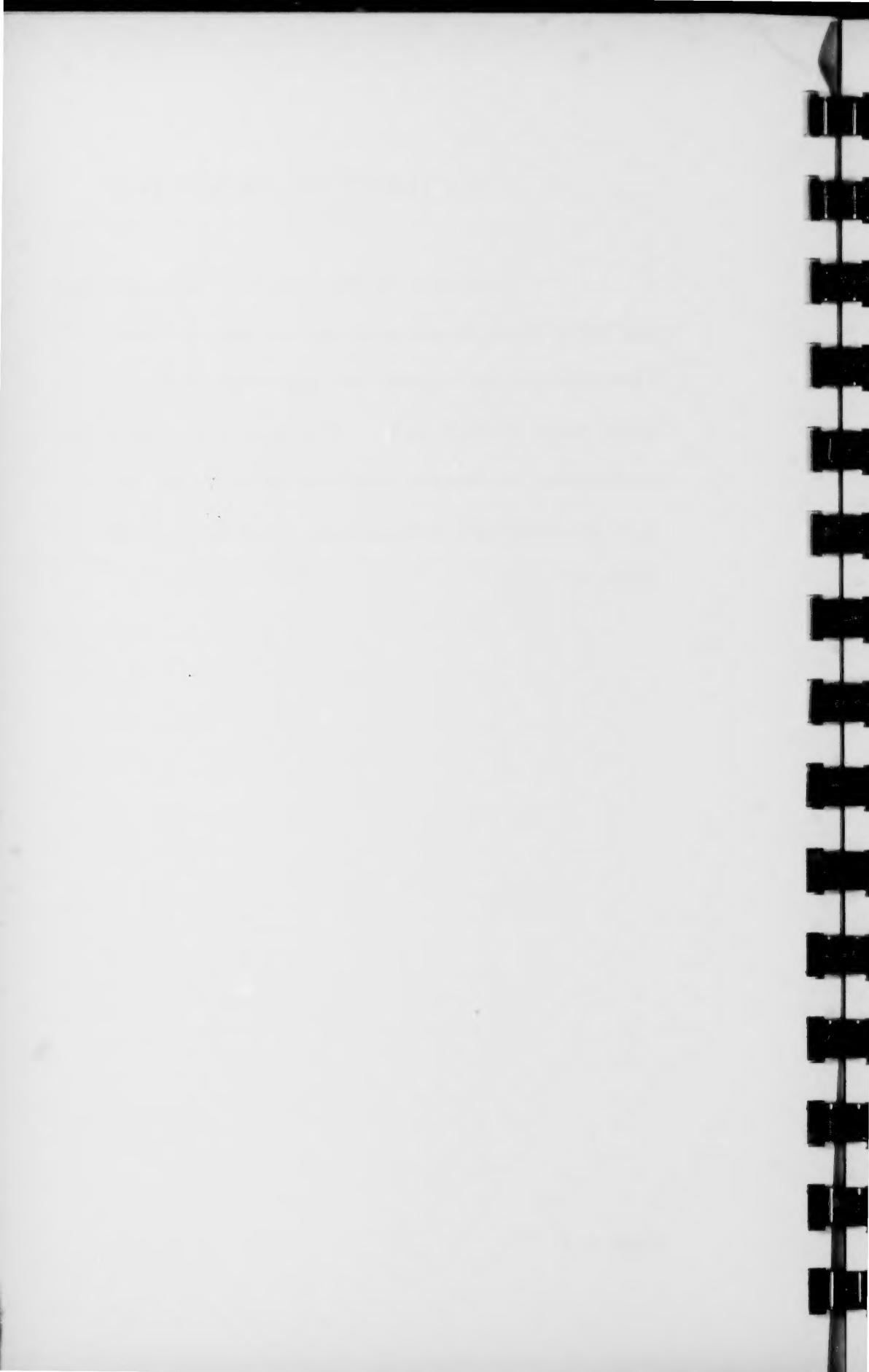


OPINIONS OF LOWER COURTS

The opinion from the United States Court of Appeals for the Fifth Circuit is reported at 731 F.2d 294 (5th Cir. 1984). (See Appendix A). The opinions from the United States District Court for the Northern District of Texas was not published. (See Appendix B and C). The opinion from the Court of Appeals for the Second Supreme Judicial District of Texas is reported at 631 S.W.2d 222 (Tex. Ct. App. - Ft. Worth 1982, pet. for disc. rev. ref'd.) (See Appendix D). The opinion from the 78th District Court of Wichita County, Texas was not published. (See Appendix E).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 7, 1984. This Petition for Certiorari was filed within sixty days of that date. The Supreme Court has jurisdiction to review the case on petition for writ of certiorari pursuant to 28 U.S.C., Sec. 1254(1).



APPLICATION FOR STAY

Petitioners have previously filed an Application For Recall and Stay of Mandate and Stay of Extradition Order of the United States Court of Appeals for the Fifth Circuit which was denied on June 19, 1984 by Justice White. (See Appendix F). Should the Court or a justice thereof believe that the consideration presented herein warrant the stay pending granting or denial of certiorari, a stay should be immediately entered to avoid the possibility of mootness due to the extradition of Petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution

Article IV, Section 2, Clause 1

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Article IV, Section 2, Clause 2

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sixth Amendment

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

18 U.S.C., Sec. 3182: Fugitives from State or Territory to State, District or Territory.

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority, from any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such



authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

STATE STATUTES

Minn. Stat. Ann., Vol. 41, Sec. 629.23(1):

When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place, and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that, in the opinion of the prosecuting attorney, the ends of justice require the

arrest and return of the accused to this state
for trial and that the proceeding is not
instituted to enforce a private claim. [emphasis
added].

Tex. Code Crim. Pro. Ann., Art. 51.13, Sec.
23(1):

When the return to this State of a person charged with crime in this State is required, the State's attorney shall present to the Governor his written motion for a requisition for the return of the person charged, in which motion shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the State in which he is believed to be, including the location of the accused therein at the time the motion is made and certifying that, in the opinion of the said State's attorney the ends of justice require the arrest and return of the accused to this State for trial and

that the proceeding is not instituted to
enforce a private claim. [emphasis added].

STATEMENT OF THE CASE

This is an interstate extradition case. On March 31, 1981, Petitioners were arrested in Wichita County, Texas on a fugitive warrant originating from a complaint and information filed by an Assistant County Attorney in Ramsey County, Minnesota. Petitioner Orison F. McDonald, II is a resident of Wichita County, Texas. Petitioner Hebert Darrell Bomar is a resident of Dallas County, Texas. The Minnesota complaint alleged violations of Minnesota security laws in the sale of oil and gas working interest to a number of Minnesota investors. The Petitioners were discharged from the fugitive warrant on August 31, 1981 because no governor's warrant had been issued for their extradition. Petitioners were arrested again in Wichita County, Texas on October 23, 1981 pursuant to a warrant issued by the Texas governor on October 16, 1981.

Petitioners filed a petition for a writ of habeas corpus in the 78th District Court of Wichita County, Texas on October 23, 1981. Petitioners were not granted a hearing on their petition for a writ of habeas corpus until December 11, 1981. At this hearing, Petitioners introduced uncontroverted evidence which showed that the motive of the State of Minnesota in seeking Petitioners' extradition was to assist private citizens in Minnesota in the collection of their personal debts. The 78th District Court of Wichita County, Texas granted the State of Minnesota's extradition request on January 11, 1982.

The Court of Appeals for the Second Supreme Judicial District of Texas affirmed the District Court's judgment on March 24, 1982. Ex Parte McDonald, 631 S.W.2d 222 (Tex. Ct. App. 1982). The Texas Court of Criminal Appeals refused Petitioners' petition for discretionary review on June 16, 1982 and denied Petitioners' motion for



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rehearing on petition for discretionary review on September 15, 1982. Petitioners' Petition for Writ of Certiorari was denied by the United States Supreme Court on February 22, 1983.

McDonald v. Texas, 103 S.Ct. 1193, 75 L.Ed 2d 438 (1983) (no. 82-987).

Petitioners sought habeas corpus relief in the United States District Court for the Northern District of Texas, Wichita Falls Division. Contemporaneous with the filing of the federal writ of habeas corpus, Petitioner McDonald, who is a debtor in possession pursuant to chapter 11 of the Bankruptcy Code, filed actions in the United States Bankruptcy Court seeking an injunction against extradition and further criminal proceedings. The Bankruptcy Court actions were transferred to the U.S. District Court, Northern District of Texas and consolidated with the writ of habeas corpus. The District Court denied habeas corpus relief. On appeal, the United States Court of Appeals for the Fifth Circuit

affirmed the opinion of the District Court on May 7, 1984.

It has been Petitioners' contention that the extradition is sought to assist private citizens in their personal lawsuits. In late 1980 and early 1981, 57 Minnesota citizens filed suit in the United States District Court for Minnesota seeking millions of dollars in damages for alleged violations of federal and Minnesota security laws. Without trial, the District Court granted judgment against Petitioner McDonald for the sum of \$3,270,292.78. The judgment against McDonald is currently pending before the United States Court of Appeals for the Eighth Circuit.

PRESENTMENT OF FEDERAL QUESTIONS
IN LOWER COURTS

Question Presented For Review Number One, which involves effective access to legal process, was first raised before the United States Bankruptcy Court for the Northern District of Texas, Wichita Falls Division in Petitioner McDonald's Adversary Complaint to Enjoin Extradition and Criminal Prosecution Under 11 U.S.C. 105; 28 U.S.C. 1481 and 28 U.S.C. 1651. Upon transfer, the District Court ruled that the doctrine of federal abstention promulgated in Younger v. Harris, 401 U.S. 37 (1971) required that the injunction be denied.

Upon appeal to the Fifth Circuit, Question Presented For Review Number One was presented in Issue Number Six of Appellants' Brief. The Fifth Circuit denied relief citing the doctrine of federal abstention, and further, that Petitioner has no federally protected right to have his



debts administered by the bankruptcy court.
(App¹: A-10 to A-12).

Question Presented For Review Number Two, which involves due process rights in the asylum state, was first presented to the 78th District Court of Wichita County, Texas in Defendants' Motion to Quash or Dismiss Extradition filed November 25, 1981. (Tr.² pp. 133-134; pp. 141-142). The 78th District Court in its Judgment stated that "such constitutional grounds as alleged have not been violated, but have been handled in compliance with the requirements of such clauses, and such motion is hereby denied. (Tr. p. 174).

On appeal to the Texas Court of Appeals, Petitioners presented Question Two in Ground of Error 5. The Texas Court of Appeals held that

¹ "App." refers to the Appendix, which due to its size has been filed as a separate document.

² "Tr" refers to the Transcript of pleadings filed in the 78th District Court of Wichita County, Texas and is part of the state court records.

the Texas Speedy Trial Act is inapplicable to extradition proceedings.³

On Petition For Discretionary Review to the Texas Court of Criminal Appeals, Petitioners presented Question Two in Ground of Review No. 2. The Texas Court of Criminal Appeals did not grant discretionary review; thus, no opinion was issued on Question Two.

On Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C., Section 2241 to the United States District Court, Question Two was presented as Ground Two (B) of Unlawful Custody. The United States District Court held that Petitioners' "allegation fails to rise to constitutional dimension".

On appeal to the Fifth Circuit, Question Two was presented as Issue No. 2. The Fifth Circuit held that due process was not a proper

³ The Texas Court of Appeals completely ignored Petitioners' claim of a right to a speedy hearing pursuant to the United States Constitution.

inquiry in the asylum state, and further, extradition should not be denied due to such because it would penalize the demanding state for the asylum state's wrong.

REASONS FOR GRANTING CERTIORARI

1. THE DECISION BELOW DENIES PETITIONERS THE
RIGHT TO PROTECT THEIR CONSTITUTIONAL RIGHT OF
ACCESS TO THE COURTS BY PERMITTING
EXTRADITION TO BE USED FOR PRIVATE PURPOSES.

All citizens are guaranteed effective access to judicial process by the Constitution. Access to the courts is a fundamental right protected by three separate provisions of the Constitution. Effective access to the judicial process is protected as a privilege and immunity accorded all citizens. Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148, 52 L.Ed 143, 146 (1907). The right to petition for redress of grievances as provided by the First Amendment guarantees all citizens with effective access to the courts. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510, 30 L.Ed 2d 642, 646 (1972). The due process clause provides

all citizens with effective access to the judicial process. Wolff v. McDonnell, 418 U.S. 539, 579, 41 L.Ed 2d 935, 964 (1974).

Bounds v. Smith, 430 U.S. 817, 52 L.Ed 2d 72, 78 (1977). The right of effective access to judicial process is a fundamental right and should not be denied absent compelling reasons. Petitioner McDonald's contention is that Petitioner's constitutionally protected right to judicial process has been wrongfully interfered with by the Minnesota prosecutor in seeking extradition; therefore, Minnesota's extradition request should be denied.

Petitioner McDonald, throughout the extradition proceedings, has contended that the motive of the Minnesota prosecutors in seeking extradition was to assist influential Minnesotans in the collection of their private debts. The 78th District Court of Wichita County, Texas, the only court to provide Petitioners with a factual hearing, found that Petitioners' private claim



evidence was uncontroverted. The necessary inquiries to resolve Petitioner's claim is whether the bad faith motive of the Minnesota prosecutor infringes upon Petitioner's constitutionally protected rights, and if so, whether Petitioner may assert this claim in his extradition proceedings.

Since there can be no question that Petitioner is entitled to effective access to legal process, the first issue is whether institution of criminal proceedings against Petitioner can interfere with Petitioner's access to legal process. Petitioner is not contending that good faith criminal prosecution is interfering with his constitutional rights. It is Petitioner's contention that bad faith criminal prosecution instituted to assist private citizens in the collection of their debts does interfere with Petitioner's constitutional rights.

The power granted to a prosecutor is extensive. The prosecutor has the discretion

whether to investigate an individual's activities for criminal violations. The prosecutor has the discretion whether to institute criminal proceedings against an individual. The prosecutor has the discretion whether to try a criminal case. Criminal prosecution and the threat of criminal prosecution is government's most effective control over the actions of an individual and is for the most part within the exclusive control of the prosecutor.

Although bad faith criminal prosecution may ultimately result in a verdict of acquittal for the wrongfully accused, the wrongfully accused will have suffered great losses due to the bad faith criminal prosecution. The obvious loss to the wrongfully accused is the substantial interference with the accused's daily activities. The accused will suffer the burden of being investigated, preparing for a criminal trial, and participating in a criminal trial. The accused will suffer the economic losses of paying for and



employing defense counsel and the interference with his employment or business. The accused will suffer the suspicions, distrust, and contempt of the community of one being under indictment for criminal charges. The injury to the accused's reputation in the community may injure the accused's business resulting in an additional economic loss. In the extradition context, one will be required to travel to a distant state, obtain living arrangements in the distant state, and defend himself in a distant state. Bad faith criminal prosecution results in substantial injury to the wrongfully accused and is a serious threat which can be used against the accused.

The prosecutor's power to initiate and control prosecution is a powerful weapon which can be used wrongfully against the private citizen. The power of the state vests in the prosecutor. The threat of prosecution is strong leverage which a prosecutor may assert to accomplish his objective.

It is the Petitioners' contention that the objective of the Minnesota prosecutor is to assist private citizens in the collection of their debts. Petitioner McDonald is and has vigorously contested his civil liability to the Minnesota citizens. Before the filing of the criminal complaint, Petitioner McDonald was contacted by several of the Minnesota plaintiffs concerning the collection of the plaintiffs' alleged debts. Petitioner McDonald was informed that, unless he met the Minnesota plaintiffs' demand for payment, criminal prosecution would be initiated against the Petitioners. Upon Petitioner McDonald's failure to pay the alleged debts, criminal proceedings were initiated against Petitioners.

Criminal process has been used to interfere with Petitioner McDonald's right of access to the courts. Petitioner McDonald, as mentioned above, is a defendant in a civil lawsuit in Minnesota federal court. Effective access to judicial

process is not limited to plaintiffs. Defendants are entitled to present their case without undue interference or harrassment from outside sources. As a result of Petitioner McDonald asserting his right of effective access to judicial process, Petitioners have been subjected to undue criminal prosecution and the possibility of extradition.

Petitioner McDonald is asserting his right to effective access to judicial process through the bankruptcy court. Petitioner McDonald is attempting to have his debts, including the contingent debts of the Minnesota Plaintiffs, administered pursuant to the Bankruptcy Code. Criminal process initiated with the intent to assist private citizens in the collection of personal debts would be in contravention of the debtor's right to effective access to the judicial process through the bankruptcy court.

The Minnesota prosecutor is not directly interfering with Petitioner McDonald's access to judicial process; however, indirect interference

with constitutionally protected right is sufficient to warrant federal intervention. United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217, 19 L.Ed. 2d 426 (1967). In United Mine Workers, the Illinois State Bar sought to enjoin a labor union from employing an attorney to represent its members in workers compensation claims. The Supreme Court held that such an injunction would indirectly interfere with the union member's First Amendment rights and would not be permitted. Id. at 221-225, 19 L.Ed. 2d 430-432. The Minnesota prosecutor's indirect interference with Petitioner McDonald's effective access to judicial process should be sufficient to warrant federal intervention. Bad faith criminal prosecution intended to interfere with access to the courts is interference with a constitutionally protected right.

The second issue to be resolved is whether Petitioners may assert interference with their

constitutionally protected right of effective access to judicial process as a defense to extradition. Traditionally, several states have denied extradition when the demanding state institutes extradition to aid enforcement of a private claim.¹

¹ State ex rel Nisbett v. Tool, 72 N.W. 53 (Minn. 1897); 72 N.W. 53 (Min. 1897); State ex rel Nemec v. Sheriff of Hennepin County, 181 N.W. 640 (Minn. 1921); State ex rel Fowler v. Langum, Sheriff, 147 N.W. 708 (Minn. 1914) (Minnesota); Ex Parte Offutt, 234 P. 222 (Okla. Crim. App. 1925); Ex Parte Owens, 245 P.2d 68 (Okla. Crim. App. 1926); Ex Parte Maddox, 27 P.2d 171 (Okla. Crim. App. 1933); Ex Parte Johnson, 25 P.2d 1111 (Okla. Crim. App. 1933) (Oklahoma); Hobbs v. State of Tennessee, ex rel (Ala. Ct. App. 1942); Scott v. State, 33 So.2d 390 (Ala. Ct. App. 1948); Stubblefield v. State, 47 So.2d 662 (Ala. Ct. App. 1950); Harris v. State, 82 So.2d 439 (Ala. Ct. App. 1955); Bishop v. State, 92 So.2d 323 (Ala. Ct. App. 1957); (Alabama); State ex rel Hourigan v. Robinson, Sheriff, 257 S.W.2d 9 (Tenn. 1953) (Tennessee); Commonwealth ex rel Spivak v. Heniz, Sheriff, 14 A.2d 875 (Penn. 1940) (Pennsylvania); Work v. Corrigan, 34 Ohio St. 64, 32 Am. Rep. 345 (Ohio); Klaiber v. Frank, 86 A.2d 679 (N.J. 1952) (New Jersey); Ex Parte Kuhns, 137 P.2d 84 (Nev. 1913) (Nevada).

In the case at bar, both the demanding state, Minnesota, and the asylum state, Texas, allow the court to inquire into the motive of the demanding state in seeking extradition. Texas Code of Criminal Procedure Annotated, Art. 51.13, Sec. 23(1) (Texas version of the Uniform Criminal Extradition Act); Ex Parte Bradley, 456 S.W.2d 370 (Tex. Crim. App. 1970); Ex Parte Seffens, 376 S.W.2d 348 (Tex. Crim. App. 1962). Minn. Stat. Ann., Vol. 41, Sec. 23(1); State ex rel Nisbett v. Tool, 72 N.W. 53 (Minn. 1897); State ex rel Nemec v. Sheriff of Hennepin County, 181 N.W. 640 (Minn. 1921); State ex rel Fowler v. Langum, Sheriff, 147 N.W. 708 (Minn. 1914). The policy of these states is clear: Extradition must not be used for private gains. The only method of preventing wrongful use of extradition is to permit the asylum state to inquire into the motives of the demanding state and to deny extradition when extradition is used for private gains.



The lower courts have held that Michigan v. Doran, 439 U.S. 282 (1978) prohibits the asylum state from inquiring into the motive of the demanding state. The Court in Michigan v. Doran was not concerned with the motives of the demanding state. As the Honorable Chief Justice Burger provided, "(w)e granted certiorari to determine whether the courts of an asylum state may nullify the executive grant of extradition on the ground that the demanding state failed to show a factual basis for its charge supported by probable cause." 439 U.S. at 283. The Court in Michigan v. Doran was concerned with the extent of inquiry by the asylum state court into the demanding state's finding of probable cause.

The lower courts, citing Michigan v. Doran, held that, upon the governor's grant of extradition, the asylum state court may only consider the following:

"(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive."

439 U.S. at 289. The lower courts' position is that constitutional violations arising from the extradition may not be considered in the asylum state court.

The Supreme Court in Michigan v. Doran provided another possible inquiry for the asylum state court; thus, the Supreme Court seemed to be indicating that the above four specific inquiries were not the full extent of asylum state inquiry. In footnote three, the Supreme Court provides:

"In Gerstein we held that 'the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following



arrest'. 420 U.S. at 114, 43 L.Ed 2d 54, 95 S.Ct. 854. Because Arizona provided a judicial determination of probable cause for the arrest warrant, we need not decide whether the criminal charge on which extradition is requested must recite that it was based on a finding of probable cause.

439 U.S. at 285, f.n.3. The Supreme Court was noting that the holding in Michigan v. Doran may not apply to a case where the demanding state did not have a finding of probable cause prior to issuing the fugitive warrant. The footnote indicates that all inquiries into constitutional violations are not precluded by Michigan v. Doran.

Another factor in determining whether Michigan v. Doran precludes inquiry into the motive of the demanding state is whether federal law is exclusive as to extradition. If the holding of Michigan v. Doran does establish all

guidelines for extradition, federal law would be exclusive as to extradition. The United States Supreme Court has held that federal law is not exclusive as to extradition. Innes v. Tobin, 240 U.S. 127, 134-135. As long as the state law does not interfere or conflict with federal law, the state law is constitutional. Id. The federal law on extradition, Article 4, Section 2, Clause 2, of the United States Constitution and 18 U.S.C., Section 3182, does not cover whether a state court may inquire into the motive of the demanding state in requesting extradition; therefore, the asylum state courts should not be denied the opportunity to inquire into the demanding state's motive pursuant to the principle promulgated in Innes v. Tobin.

A possible obstacle to enjoining the extradition is the doctrine of federal abstention as provided in Younger v. Harris, 401 U.S. 37 (1971). In Younger, the Court held that absent extraordinary circumstances, a federal court is

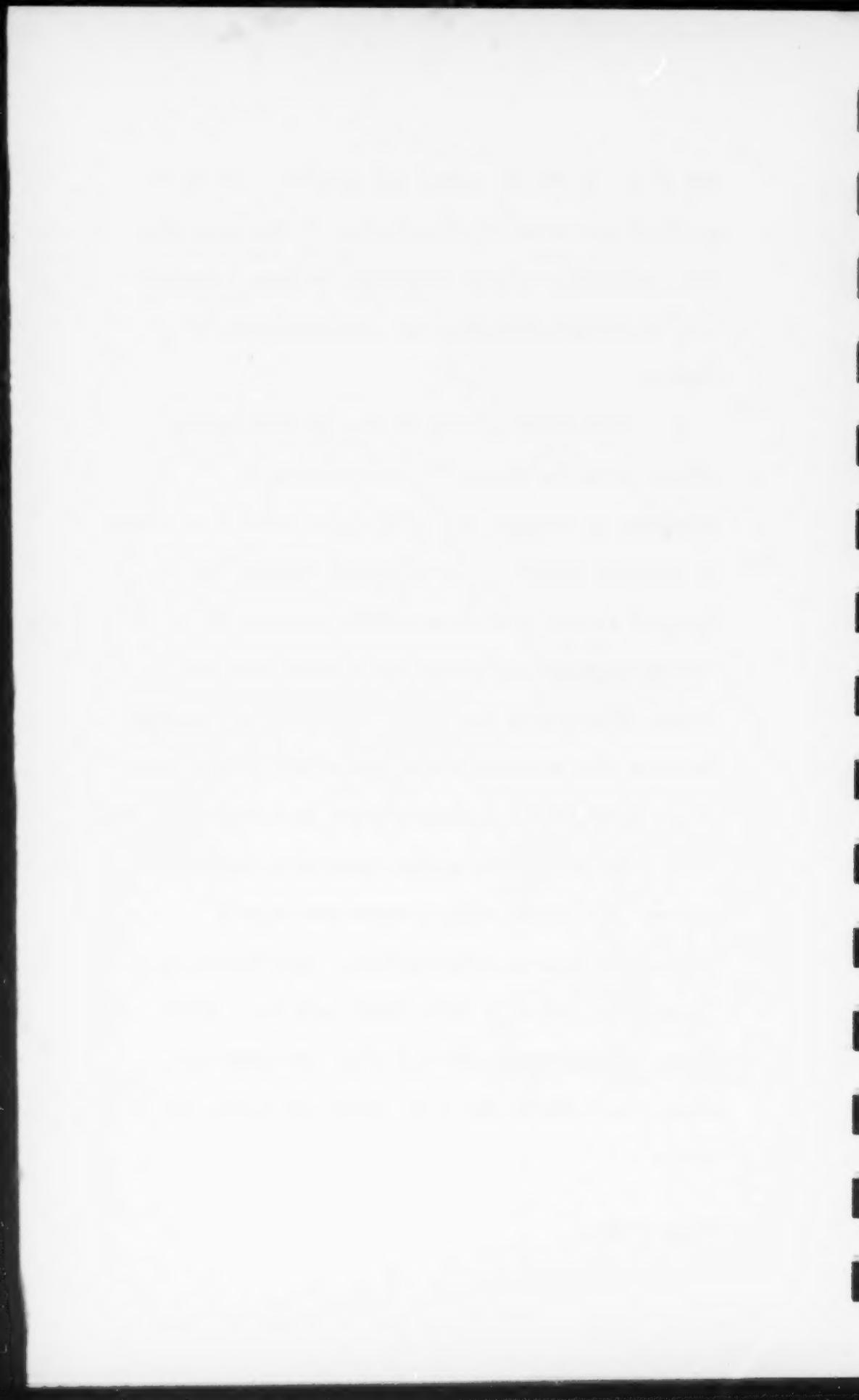
precluded from enjoining a pending state criminal prosecution. 401 U.S. at 41.

One implied exception to the Younger doctrine of federal abstention is bad faith criminal prosecution. 401 U.S. at 47-49. The court in Younger distinguished the earlier case of Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed. 2d 22 (1965) in which the court permitted an injunction against criminal prosecution. One factor cited by the court in Dombrowski in finding abstention inappropriate was bad faith criminal prosecution. Id. at 490. The Supreme Court in Younger states as follows:

"These circumstances (bad faith criminal prosecution in Dombrowski), as viewed by the Court, sufficiently establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention."

401 U.S. at 48, 27 L.Ed. 2d at 678. Bad faith criminal prosecution, as present in the case at bar, warrants, if not demands, federal intervention to protect fundamental constitutional rights.

The Fifth Circuit in the opinion below relied upon the Eleventh Circuit case of Barnette v. Evans, 673 F.2d 1250 (11th Cir. 1982) in denying relief. The Eleventh Circuit in Barnett stated that prosecution brought as a "subterfuge for collection of a debt" did not create irreparable injury as required by Younger because the accused could defeat the prosecution in a single criminal proceeding. 673 F.2d at 1252. As discussed above, bad faith criminal prosecution establishes irreparable injury permitting federal intervention. See Wilson v. Thompson, 593 F.2 1375, 1382 (5th Cir. 1979); Shaw v. Garrison, 467 F.2 113, 120 (5th Cir. 1972) (cert den'd 409 U.S. 1024, 34 L.Ed. 2d 317).



The Fifth Circuit in the opinion below states that McDonald has no federally protected rights in bankruptcy. It is true that the state court may require restitution as a condition of probation without interfering with federally protected rights. The issue is not what the state court may permissibly do, but for what reasons may a prosecutor institute and prosecute criminal proceedings. As discussed above, it is clear that McDonald has a federally protected right of effective access to judicial process through civil and bankruptcy courts. Action taken by a criminal prosecutor to interfere with access to judicial process is interference with a federally protected right.

Summary: Petitioners are entitled to effective access to judicial process. The State of Minnesota, by seeking extradition for private purposes, is interfering with Petitioners' rights of access to the courts. To adequately protect Petitioners' constitutional rights,



Petitioners should be permitted to assert their constitutional rights in the asylum state for the purpose of defeating extradition.

2. THE DECISION BELOW DENIES PETITIONERS THE RIGHT TO ASSERT THEIR RIGHT TO DUE PROCESS AT A MEANINGFUL TIME.

It is Petitioners' contention that the Due Process Clause of the Fourteenth Amendment accords Petitioners with the right to a speedy habeas corpus hearing in the asylum state. The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". Even though extradition may not be a stage in a criminal prosecution at which speedy trial pursuant to the Sixth Amendment may be asserted, due process is applicable in all proceedings involving the loss of liberty or

property and provides the right to a speedy hearing.

The right to a speedy hearing is an essential element of due process. In a recent United States Supreme Court decision, the Court provided:

"the fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity' which must be granted at a meaningful time and in a meaningful manner."

Parrat v. Taylor, 451 U.S. 527, 540 (1981) citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965). In an earlier United States Supreme Court decision, the Court provided:

" promptness of decisions which in all judicial actions is one of the elements of justice."

Forsyth v. Hammond, 166 U.S. 506, 513 (1897). To provide Petitioners with due process in the extradition context, the asylum state court must



provide Petitioners with a speedy hearing to determine the legality of the proposed extradition.

Availability of due process protection depends upon the extent to which an individual will be condemned to suffer a grievous loss. Morrisey v. Brewer, 408 U.S. 471 (1972). Extradition results in a grievous loss to the accused. At the minimum, extradition results in imprisonment and transfer to a foreign state. Arrest of the accused in the asylum state results in embarrassment and ridicule for the accused. One facing extradition should be accorded a high level of due process protection in accordance with the serious loss of individual liberty resulting from extradition.

The Eighth Circuit has held that the speedy hearing requirement of the due process clause is applicable to proceedings under the Interstate Detainer Act. Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973). The Eighth Circuit provided:



"The concept of a speedy trial as embodied within the Sixth Amendment to the United States Constitution was recognized to be so basic to a fair trial that it was set forth in a separate amendment. However, speedy trial applicability only to actual criminal prosecution does not mean that the due process clause rejects a prompt and timely hearing in other procedures, formal or informal."

Id. at 312. The Eighth Circuit's reasoning in Cooper is that one is entitled to a speedy hearing pursuant to the due process clause even though the proceedings may not be classified as a criminal prosecution for Sixth Amendment purposes. The Cooper court held that the grievous loss suffered by a prisoner facing transfer under the Interstate Detainer Act requires that the prisoner be afforded a prompt hearing pursuant to the due process clause. Id. at 314. One facing extradition is subject to loss of liberty much



the same as in an interstate extradition proceeding; therefore, one facing extradition should be accorded the same procedural protections, including a speedy hearing, as one facing transfer pursuant to the Interstate Detainer Act.

The Fifth Circuit in the opinion below held that inquiry into due process is not appropriate in a habeas corpus hearing challenging extradition. The Fifth Circuit stated that the Supreme Court in Michigan v. Doran limited the subjects of inquiry and due process was not a subject of inquiry in Michigan v. Doran.

As has been thoroughly discussed in the petition (pp. 35-36) Michigan v. Doran is not the sole authority on the rights of the accused in the asylum state. Another distinction between the case at bar and Michigan v. Doran is the substantive versus procedural distinction. Michigan v. Doran concerned inquiries into substantive matters. Michigan v. Doran did not purport to limit procedural due process

protections. For example, one permissible inquiry pursuant to Michigan v. Doran is whether the petitioner is a fugitive. 439 U.S. at 289, 58 L.Ed. 2d at 527. It would be a denial of procedural due process to require the state court to find that petitioner be a fugitive before extradition and, then, to deny the petitioner the opportunity to prove he is not the fugitive. It cannot be said that due process rights are not presentable in any hearing involving the loss of liberty.

If Petitioners are to be allowed to assert their due process rights at a meaningful time, Petitioners must be permitted to assert their due process rights in the asylum state. When the due process violation occurs in the asylum state, Petitioners must be permitted to assert their due process rights in the asylum state. If Petitioners are not permitted to assert their due process rights in the asylum state, the loss of liberty will have occurred before the Petitioners will



have the opportunity to prevent the wrong. To assert their due process rights at a meaningful time, Petitioners must be permitted to assert their due process rights in the asylum state.

The Fifth Circuit in the opinion below states that Petitioners should not be permitted to assert their due process rights in the asylum state because it would penalize the demanding state for the asylum state's wrong. The obvious error with this statement is that it assumes the delays were caused by the asylum state, not the demanding state. The delay may be caused by the failure of the demanding state to forward the extradition papers to the demanding state after the arrest of the alleged fugitive.

The demanding state is the agent of the asylum state in the extradition context.

Braden v. 30th Judicial Court of Kentucky, 410 U.S. 484, 498-499, 35 L.Ed. 2d 443, 454 (1973). As in traditional principal-agent relationships, the principal should be responsible for the

wrongs of the agent. The asylum state is acting for and to the benefit of the demanding state. The wrongs of the asylum state should be considered the wrongs of the asylum state. The constitutional rights of the accused must be protected, regardless of the source of the wrong.

Summary: The right to a speedy hearing is an element of due process. Whenever a proceeding may result in the loss of liberty, due process must be provided to the participants in the hearing. Whenever the denial of due process occurs in the asylum state, the alleged fugitive must be permitted to assert his due process rights in the asylum state for his process rights to be meaningful.

CONCLUSION

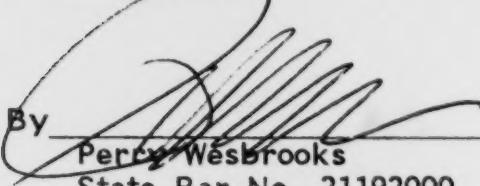
A writ of certiorari should issue to review the opinion and judgment of the Fifth Circuit to ascertain the constitutional rights of the accused in the asylum state.



Respectfully submitted,

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